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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

CHRISTOS PARISIS,

Plaintiff and Appellant, **A143708**

v. **(San Mateo County Super. Ct. Nos. CIV500570, CLJ503898, CLJ503899)**

HELEN SOTIRIADIS et al.,

Defendants and Respondents.

_____/

Plaintiff Christopher Parisis appeals from orders setting aside default judgments against defendants Helen and John Sotiriadis (collectively, defendants) on equitable grounds. Plaintiff contends the court erred by granting defendants' motions to set aside the default judgments because defendants failed to establish extrinsic fraud or mistake. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff filed three lawsuits against defendants and others for conversion and breach of fiduciary duty arising out of plaintiff's attempt to purchase real property.[1] In late 2011, defendants went to Greece to care for an ailing family member. As relevant

[1] The operative complaints are not part of the appellate record. Other defendants who are not parties on appeal are not mentioned. For clarity, we refer to Helen and John Sotiriadis individually by their first names. Defendants filed three separate, but largely identical, motions to set aside the defaults and default judgments. We describe the motions and the proceedings relating to those motions in the singular.

here, attorney Carl M. Durham represented defendants from early 2012 until June 2013. In March 2012, Durham received form interrogatories and requests for admission from plaintiff but did not send the discovery to defendants until May 2012, after plaintiff had moved to compel responses. In May 2012, the court granted plaintiff's unopposed motion to compel responses to form interrogatories and to deem the requests for admission admitted. Two months later, the court granted plaintiff's unopposed motion to compel Helen's deposition and sanctioned her.[2] In March 2013, the court granted plaintiff's unopposed motion for terminating sanctions against Helen. In September 2013, the court entered defendants' default and default judgments for plaintiff totaling $82,066.

Motion to Set Aside Defaults and Default Judgments

In October 2013, defendants sought relief from the default judgments in propria persona. The court denied their procedurally defective motion and defendants hired an attorney, Christopher Jafari. In February and May 2014, defendants moved to set aside the defaults and default judgments on equitable grounds, claiming the judgments were "obtained as a result of extrinsic fraud and/or extrinsic mistake . . . and error caused by prior counsel as admitted by him in his own declaration." Defendants argued they had a "meritorious case" against plaintiff because the operative complaint was defective and because defendants did not withhold money from plaintiff. Next, defendants argued Durham's misconduct constituted a "satisfactory excuse for not presenting a defense to the original action." According to defendants, Durham "hid the truth of the status of the case from [them]" and failed to: (1) "defend them" or "represent their interests[;]" (2) respond to discovery or inform them of discovery deadlines; (3) oppose plaintiff's motions to compel Helen's deposition and to compel responses to discovery; or (4) oppose plaintiff's motion for terminating sanctions, which "resulted in the default

[2] In February 2013, Durham moved to withdraw as counsel, but the court rejected the motion because it included an improper filing fee. Durham refiled the motion, which the court denied because it did not attach a proposed order. In April 2013, Durham filed a third motion to withdraw as counsel, and the court granted it in June 2013.

judgment[s]." Finally, defendants claimed they demonstrated diligence in moving to set aside the default judgments.

In a supporting declaration, Durham averred "[t]hrough [his] own mistake, inadvertence, and neglect," he did not seek an extension of time to respond to plaintiff's written discovery and failed to oppose plaintiff's motion to compel responses, which resulted in plaintiff's requests for admissions being admitted and the imposition of monetary sanctions against Helen. He also admitted, "[t]hrough [his] own mistake, inadvertence, and neglect," he did not oppose plaintiff's motion for terminating sanctions against Helen, "which resulted in the unopposed motion being granted and default judgments being entered against Helen [ ] in all three matters."

In her supporting declaration, Helen averred: (1) she and her husband traveled to Greece in October 2011 to care for an ailing family member and instructed Durham to postpone case deadlines until defendants returned to the United States; (2) while defendants were in Greece, Durham received plaintiff's written discovery but did not send it to defendants until after plaintiff had moved to compel responses; (3) Durham did not tell her a date had been set for her deposition; and (4) Durham failed to notify her about plaintiff's motions to compel and for terminating sanctions or oppose the motions. Helen's declaration attached deposit receipts and wire transfers regarding deposits to plaintiff's bank account and defendants' correspondence with Durham. John submitted a similar declaration.

In his supporting declaration, Jahari averred Durham did not oppose plaintiff's motions: (1) to compel responses to form interrogatories and to deem requests for admission admitted against Helen; (2) to compel Helen's deposition and for monetary sanctions; or (3) for terminating sanctions against Helen. Jahari also stated Durham received "numerous documents from Plaintiff's counsel . . . which included written discovery and deposition notices, but [Durham] had either failed to forward them to Defendants, or he submitted them to Defendants in a severely untimely fashion." Finally, Jahari averred "Durham failed to send any written communications whatsoever to Defendants warning them that there were pending motions to compel and related

terminating sanctions that would eventually have highly detrimental results against Defendants."

Jahari's declaration attached a proposed answer and a January 2014 letter from Durham to Jahari explaining the circumstances surrounding Durham's motion to withdraw as counsel. According to the letter, Durham was unable to reach defendants in late 2012 and early 2013. In February 2013, Durham discussed plaintiff's motion for terminating sanctions with John, who told him defendants "could not afford to pay their bills, they did not want [Durham] to run up the legal fees any further, and he needed to talk to Helen on what they wanted [Durham] to do going forward." Durham did not file a written opposition to plaintiff's motion for terminating sanctions because "John never got back to [him]" but Durham attended the hearing on the motion, where he "tried to explain to the court that [he had] not heard from [his] clients" and urged the court to "postpone the decision" on the motion.

Opposition, Reply, and Order Granting the Motion

In opposition, plaintiff argued defendants were not entitled to equitable relief. According to plaintiff, defendants' proposed answer and supporting declarations did "not establish a meritorious defense of payment because the amounts allegedly paid" were "less than that owed and demanded," and did "not appear related to the monies that Plaintiff paid defendants." Plaintiff also claimed defendants had not shown a satisfactory excuse for failing to defend the original actions, apparently because Durham's declaration did not admit the default or default judgment "was caused by either extrinsic fraud or extrinsic mistake. His declaration only states that he did not oppose the motion due to his 'own mistake, inadvertence and neglect.'" In addition, plaintiff contended Durham did not abandon defendants; instead, defendants "abandon[ed] . . . the litigation." Finally, plaintiff argued defendants were not diligent in seeking relief from the default judgments. In a supporting declaration, plaintiff averred, among other things, that he "demanded $51,500 . . . for monies [he] wired to Defendants" but the documents attached to defendants' declarations show "only $37,641.80 in payments."

In reply, defendants argued they had a meritorious case because plaintiff conceded receiving some money from defendants. According to defendants, "had this matter been heard on its merits, Plaintiff would have only received judgment in an amount [ ] no greater than $13,858.20." At a hearing on the motion, the court observed it was "a close call" but that defendants were entitled to equitable relief. The order granting defendants' motion to set aside the defaults and default judgments provides: "Equitable relief is appropriate in this instance, as the court is enabled to grant relief from default or default judgment procured by extrinsic fraud or mistake. . . . Such relief may be given at any time and is not subject to the time limitations set forth in Code of Civil Procedure [section] 473."

DISCUSSION

A trial court has inherent power to vacate a default judgment on equitable grounds such as extrinsic fraud and mistake. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981 (*Rappleyea*); *Aldrich v. San Fernando Valley Lumber Co.* (1985) 170 Cal.App.3d 725, 736 (*Aldrich*).) Although "the terms 'fraud' and 'mistake' have been given a broad meaning by the courts, and tend to encompass almost any set of extrinsic circumstances which deprive a party of a fair adversary hearing[,]" (*Aldrich, supra,* at p. 738) when "a default *judgment* has been obtained, equitable relief may be given only in exceptional circumstances." (*Rappleyea, supra,* 8 Cal.4th at p. 981.) To qualify for equitable relief from default on the basis of extrinsic fraud or mistake, the defendant must demonstrate: (1) "a meritorious case[;]" (2) "a satisfactory excuse for not presenting a defense to the original action[;]" and (3) "diligence in seeking to set aside the default once the fraud [or mistake] had been discovered." (*In re Marriage of Stevenot* (1984) 154 Cal.App.3d 1051, 1071.) We review the order granting defendants' motion to set aside the defaults and default judgments for abuse of discretion. (*Rappleyea, supra,* 8 Cal.4th at p. 981.)

As he did in the trial court, plaintiff contends defendants' proposed answer and supporting declarations "do not establish a meritorious defense of payment because the amounts allegedly paid are less than what is owed and demanded[.]" We are not persuaded. Only a minimal showing is necessary to establish a meritorious case in this

context. (*Stiles v. Wallis* (1983) 147 Cal.App.3d 1143, 1148.) "Ordinarily a verified answer to a complaint's allegations suffices to show merit. [Citation.] The answer here was not verified, but neither was the complaint." (*Rappleyea, supra,* 8 Cal.4th at p. 983.) Here, defendants' proposed answer and supporting declarations "were sufficient to establish [they] had a meritorious case" (*Aldrich, supra,* 170 Cal.App.3d at p. 738) particularly because plaintiff conceded defendants had paid some of the money they allegedly owed. "On the combined strength of these facts, we believe defendants have sufficiently shown merit." (*Rappleyea, supra,* 8 Cal.4th at p. 983.)

Defendants also established a satisfactory excuse for not presenting a defense to the original actions: Durham's "'positive misconduct.'" (See *Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892, 899 (*Carroll*), quoting *Daley v. County of Butte* (1964) 227 Cal.App.2d 380, 391 (*Daley*).) Generally, "the negligence of an attorney is imputed to the client." (*Seacall Development, Ltd. v. Santa Monica Rent Control Bd.* (1999) 73 Cal.App.4th 201, 204-205 (*Seacall*).) There is an exception to this rule, however, when "'"'the attorney's neglect is of that extreme degree amounting to positive misconduct, and the person seeking relief is relatively free from negligence."' [Citation.]" (*Id.* at p. 205; quoting *Carroll, supra,* 32 Cal.3d at p. 898.) "'Positive misconduct is found where there is a total failure on the part of counsel to represent his client.'" (*People v. One Parcel of Land* (1991) 235 Cal.App.3d 579, 584 (*One Parcel*), quoting *Aldrich, supra,* 170 Cal.App.3d at pp. 738-739.)

An attorney's failure to oppose a dispositive motion "suggests positive misconduct[.]" (*One Parcel, supra,* 235 Cal.App.3d at p. 584 [failure "to oppose the default judgment motion" or "return any of [his client']s telephone calls"]; *Aldrich, supra,* 170 Cal.App.3d at pp. 731-732 [failure to oppose motion to dismiss].) Here, Durham concealed information about the status of the litigation from defendants and disregarded their directions to postpone case deadlines while they were in Greece. He failed to timely respond to plaintiff's written discovery or advise Helen about her deposition. He did not oppose plaintiff's motions to compel, resulting in the imposition of sanctions against Helen and plaintiff's requests for admission being admitted. Durham

also failed to oppose plaintiff's motion for terminating sanctions, resulting in defendants' default. The facts "in the present case plainly show [Durham] abandoned [his] client[s]." (*Seacall, supra,* 73 Cal.App.4th at p. 205.)

According to plaintiff, defendants are not entitled to relief because they — not Durham — "abandoned the litigation[.]" To support this argument, plaintiff relies on Durham's letter to Jahari, where Durham claims he did not oppose plaintiff's motion for terminating sanctions because John told him defendants could not afford to pay him and never "got back to [him]" about whether to oppose the motion. Plaintiff's reliance on Durham's letter is unavailing because Durham abandoned his clients long before plaintiff moved for terminating sanctions. In 2012, Durham failed to respond to plaintiff's written discovery and failed to oppose plaintiff's motions to compel. By May 2012 — over a year before the court granted plaintiff's unopposed motion for terminating sanctions and nine months before Durham moved to withdraw as counsel — the court had deemed plaintiff's request for admissions admitted, effectively ending any hope of a defense. Under the circumstances, defendants' purported failure to direct Durham to oppose the motion for terminating sanctions in March 2013 does not demonstrate defendants abandoned the litigation.

That defendants could have been more diligent in monitoring their case (*Wilson v. Wilson* (1942) 55 Cal.App.2d 421, 427) does not alter our conclusion. "'Clients should not be forced to act as hawklike inquisitors of their own counsel, suspicious of every step and quick to switch lawyers.'" (*Aldrich, supra,* 170 Cal.App.3d at p. 739, quoting *Daley, supra,* 227 Cal.App.2d at p. 392.) Courts have concluded a party is entitled to relief from default or dismissal on equitable grounds even where that party does "not assiduously seek out his [or her] attorney." (*Aldrich, supra,* 170 Cal.App.3d at pp. 739-740; see also *Seacall, supra,* 73 Cal.App.4th at pp. 205-206 [plaintiff entitled to relief from dismissal despite not contacting its attorney in the two years between filing the action and the dismissal].)

Finally, the court did not abuse its discretion when it concluded defendants established they were diligent in seeking to set aside the defaults once discovered. (*One*

Parcel, supra, 235 Cal.App.3d at p. 584.) The record shows defendants acted reasonably diligently upon learning of the defaults. Defendants sought relief in propria persona shortly after the default judgments were entered; when this effort was unsuccessful, they promptly hired Jahari, who moved to set aside the defaults and default judgments in a timely fashion. (*Ibid.*) We conclude defendants "made an adequate showing of all three factors essential to an exercise of the court's inherent equitable authority to set aside the default judgments based on extrinsic [fraud or] mistake. 'A motion to set aside a default judgment is addressed to the sound discretion of the trial court, and, in the absence of a clear showing of abuse of discretion where the trial court grants the motion, the appellate court will not disturb the order.'" (*One Parcel, supra,* 235 Cal.App.3d at p. 584, quoting *Weitz v. Yankosky* (1966) 63 Cal.2d 849, 854.)

DISPOSITION

The orders setting aside the defaults and default judgments are affirmed. Defendants are entitled to costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

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Jones, P.J.

We concur:

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Needham, J.

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Bruiniers, J.